

ROMAN LAW IN ENGLISH JURISPRUDENCE.

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ROMAN LAW IN ENGLISH JURISPRUDENCE.

There is no history of the Roman law in England. The writers of the history of the English law have, as a rule, devoted but little attention to this branch of their subject. Various causes have combined to bring about this result. The majority of them, like most English lawyers, have had but an imperfect acquaintance with the civil law. Many of them have been unduly influenced by the prejudices of their countrymen, which, at different periods and at certain important epochs in the history of the country, have been unreasonably strong against the Roman law and its principles. This prejudice has been so great that it has prevented some of the most distinguished writers on English law from even acquiring a fair knowledge of the Roman law. It is not a thing unknown to find, even in authors of high repute, depreciatory remarks about the civil law, in close relation to words of praise for some principles of the common law supposed to be indigenous to that system, when even a superficial knowledge of the Roman law would have revealed the fact that the principles in question had been taken bodily from that source. The fact alone that they came from Rome has been often sufficient to excite antipathy to them, on both national and religious grounds.

It was not to be expected that the study of the civil law would have been pursued as diligently in England as in those continental countries whose jurisprudence is almost solely derived from it, and where it is recognized as a primary authority; but it is not complimentary to English legal learning to be compelled to acknowledge the fact, that we are indebted quite as

much to the researches of German scholars as to those of England for our present knowledge on the subject of this paper. The names of Savigny, Güterbock, Biener, and Wenck, are deserving of special mention in this connection.

The majority of English legal authors and judges have failed to properly appreciate or acknowledge the merits of that law, which, as a distinguished Chief Justice of England has said,* is "the fruit of the researches of the most learned men, and the collective wisdom of ages." To this, it must be confessed, there are some notable exceptions. We are told by Burnett, in his *Life of Sir Matthew Hale*, that the latter "set himself to the study of Roman law, and he often said that the true grounds of reasons of law were so well delivered in the Digest, that a man could never understand law as a science so well as by seeking it there, and therefore he lamented that it was so little studied in England." Another brilliant Chief Justice of England, who turned his intimate knowledge of the civil law to good account by evolving from its principles the symmetrical system of mercantile law which we possess at the present day, and substituting it for the chaotic mass of conflicting principles which prevailed before his time, says of the Roman law: "It is admirably calculated to furnish the minds of youth with universal and leading notions relating to natural and positive, to written and unwritten, law; it instructs them in the various rights of persons, whether in a natural or civil capacity; the origin and rights of property; the grounds and reasons of testamentary and legal succession; the obligations arising from proper and improper contracts; the several species of civil injuries and crimes, together with the means of applying for and obtaining redress, and of bringing the guilty to condign punishment." America has also paid a fitting tribute to the same wonderful system, through the leading commentator on its law, Chancellor Kent, who says,† "The rights of absolute and usufructuary property, and the various ways by which property may be acquired, enlarged, transferred and lost, and the inci-

* Tindal, C. J., *Acton v. Blundell*, 12 Meeson & Welsby's Reports, p. 353.

† Commentaries, Vol. I., Lecture XXIII.

dents and accommodations which fairly belong to property, are admirably discussed in the Roman law, and the most refined and equitable distinctions are established and vindicated. Trusts are settled and pursued through all their numerous modifications and complicated details in the most rational and equitable manner. So the rights and duties flowing from personal contracts, express and implied, and under the infinite variety of shapes which they assume in the business and commerce of life, are defined and illustrated with a clearness and brevity without example. In all these respects, and in many others, the civil law shows the proofs of the highest cultivation and refinement; and no one who peruses it, can well avoid the conviction that it has been the fruitful source of those comprehensive views and solid principles which have been applied to elevate and adorn the jurisprudence of modern nations." It is to another distinguished American writer that we are largely indebted for having made known to English-speaking professional men on both continents, the similarity between the common and civil law on very many points, and the obligation of the latter to the former. Judge Story, in his admirable commentaries, and particularly in his works on Equity Jurisprudence, Partnership, Bailments and Agency, has probably done more than any other writer to popularize the civil law in England and America, and to lead students to seek an acquaintance with its principles.

In endeavoring to analyze the English law, or to trace it to its sources, it is well to bear in mind the words of Lord Bacon, who has said that "Our laws are as mixed as our language, compounded of British, Roman, Saxon, Danish and Norman customs; and as our language is so much the richer, so the laws are the more complete." Most of the English writers on the sources of our law have put forward for the Saxon or common law, claims that it is believed a critical investigation will show not to be well founded.

The object of the present paper will be to trace the influence of the Roman law in England, and to endeavor to show that it has contributed to English jurisprudence some elements that

have, in both the popular and professional mind, been credited to other sources. The history of that law in England, and its introduction at different times and by different means, will first be briefly sketched. Its acceptance as a direct authority in a greater or less degree in special courts may next be considered, while those branches of the English law which are more than others indebted to the Roman law may be glanced at, as well as the means by which they have been incorporated into the jurisprudence of England.

ROMAN OCCUPATION.

From what we know of the ancient Britons, they had nothing that could be designated by the name of government or of law, in the modern acceptation of these terms. As Sir James Mackintosh has well said :* "It is vain to inquire into forms of government prevalent among a people in so low a state of culture. The application of the terms which denote civilized institutions to the confused jumble of usages and traditions, which gradually acquire some ascendancy over savages, is a practice full of fallacy. It is an abuse of terms to bestow the name of government on such a state of society." The Romans, therefore, on their conquest and occupation of the country in the first century of the Christian era, had no laws or even established customs to displace. They introduced a system of law that seemed capable of universal application, and which was admirably adapted to mould and civilize the nations which they had subdued by the force of their arms. In other countries, where local usages had obtained some degree of consistency, the Roman law at this period showed a degree of flexibility in incorporating these into its own system. As Sandars says, in his introduction to the Institutes : "The history of Roman law is the history of the changes introduced into this law, of the additions made to it, and of the method adopted in the process. The notion of a body of customary law, mainly unwritten, which was not abrogated, but was evaded or amplified by persons acting under the ideas of later times, must be embraced

* History of England, Ch. I.

clearly by any one who wishes to understand Roman law." In Britain we have good reason to believe that the provincial system was administered during the greater part of the four centuries of Roman occupation with considerable efficiency, and we have the testimony of Tacitus* to the fact that from its introduction it had a refining and civilizing influence upon the savage Britons. It was also during this period that all the free subjects of the empire were admitted to the rights of citizenship by Caracalla. We may also assume that, for the reason above stated, the Roman law was, during the same period, administered in a purer form and with greater strictness than where the conquered nation, previous to its subjugation, had attained to some degree of civilization. Britain is also specially connected with some of the greatest names in Roman legal history, and the promulgation of some important laws. We learn from Dio Cassius, that Papinian, the most celebrated of Roman jurists, filled the office of Prætorian Prefect at York, under the Emperor Severus, and it is also claimed that he had Ulpian and Paulus for his assessors. Severus, in the last year of his reign (A.D. 222), promulgated at York the law by which a master might acquire property through the slave of another in his *bona fide* possession.† The law prohibiting a testator from naming his son's heirs before naming his own, was due to a rescript sent to Virius Luppus, the Roman governor of Britain.‡ During the latter half of the Roman occupation the country had the advantage not only of the earlier civil law, but also of the works of the "five great luminaries of Roman jurisprudence, Gaius, Papinian, Paul, Ulpian and Modestinus." The Theodosian code was published only a few years before the withdrawal of the Roman legions; but there is little doubt that it had found its way to Britain. Roman institutions, customs and culture had taken deep root, and remained long after the withdrawal of the Roman armies. Indeed, to such an extent was this the case, that the British author, Gildas, writing about a century after the legions had retired, speaks of Roman institutions

* Agricola, Bk. V., Ch. XXXII.

† Code, Lib. III., Tit. XXXII., 1.

‡ Digest, Lib. XXVIII., Tit. VI., 1, § 6.

prevailing in Britain to such an extent that it was called "Romania."

The influence of the Church also contributed largely to the same result. St. Augustine and the early fathers were great admirers of the civil law, and even in the Theodosian code, we find a number of laws referring municipal affairs to the bishops and clergy. From the body of laws compiled in the early part of the tenth century by the Welsh king, Howell Dhu, we have evidence that the Britons who had been driven into Wales by the Saxons, had retained even up to that time the impress of Roman institutions and laws that had been stamped upon the country more than five centuries before. On this subject, Mr. Finlason has well said,* "The Roman system of government in the provinces was one so complete and perfect in all its parts, with such an elaborate organization, not only extending over every part of the country, but entering into all the relations of life and all classes of society, that it could hardly fail to implant its laws and institutions very deeply, even among the native population; and when to this is added the establishment of colonies, the erection of municipal corporations, the operation of the manorial system, and the effect of intermarriages in blending the Roman and the British races, it is impossible not to see that Roman laws, institutions and ideas must have taken firm root, especially as there was a uniform administration of justice. Those who had been so long accustomed to the Roman rule would probably, even when asserting their independence of it, desire to preserve the laws and institutions, the advantage of which they had so long enjoyed; and the voice of history assures us that this was so in point of fact. From these causes it was impossible but that in the course of centuries, during which the whole fabric of Roman society, and of Roman civilization with all its laws and institutions, was firmly established here, those laws and institutions must have taken deep root, the institutions through their being everywhere planted, and the laws through their becoming incorporated with the customs of the people."

* Introduction to Reeves' History of the English Law, p. xxxiv.

SAXON AND DANISH RULE.

On no question are the authorities more at variance, than as to the extent to which the laws in force in England at the date of the Norman Conquest had a Roman origin. Nearly all the leading writers claim for them a purely Saxon or Norse parentage. Many of those who are prepared to admit that Roman institutions and laws had flourished and taken root under Roman rule, claim that they either entirely disappeared before the wave of anarchy which swept over the country, or that they were driven to the wilds of Wales and Cornwall, with the Romans and Britons who took refuge there, where they may for a time have lingered. The claim, however, put forward by Mr. Finlason, for the continuance of the Roman law in a modified form, seems to be strongly supported by the more recent investigations, and the more thorough study of the Roman law, particularly in Germany. "The Saxons, therefore, did not bring any institutions or laws worthy of the name with them. They brought only rude, barbarian usages, as will be seen in their written laws, which express for the most part their own usages; such, for instance, as the ordeal. It is manifest that they created nothing civilized. On the other hand, it is equally clear that they destroyed nothing civilized; that is, they destroyed no existing institutions, they eradicated none of the existing laws or usages in which lay so much of Roman law. They neither created nor destroyed; they adopted and appropriated, trying, no doubt, to mix up their own barbarous usages, which, however, it was found, as will be seen, would not coalesce or unite with civilized institutions, so that this baser matter soon fell off, and left the whole fabric of Romanized laws and institutions, save that the Saxons infused into the Roman institutions their own rough spirit of freedom, which gave them fresh life and vigor. But they did not destroy the Roman laws and institutions. The notion that they did so, arose from an erroneous idea as to the nature of their invasion. It is imagined that there was a sudden and sweeping Saxon conquest, and

hence it is supposed that institutions entirely perished and disappeared. The conquest of the country by the Saxons was a slow and gradual process, extending over five centuries, and scarcely completed when the Danish invasion occurred. And during that long period there was, of course, to a great extent, an amalgamation between the races, and a mixture of usages and laws."* Speaking on the same subject, Guizot says:† "It follows evidently from the facts laid before you, that not only in municipal institutions and laws, as Savigny has proved, but in political order—in all departments of social and intellectual life—the Roman civilization was transmitted far beyond the date of the empire; that we may everywhere discern a trace of it; that the thread is nowhere broken." And again: "One is surprised that the permanence of the Roman law, after the fall of the empire, should ever have been doubted. Not only do the barbaric laws everywhere make mention of the Roman laws, but there is scarcely a single document or act of that epoch which does not, directly or indirectly, attest their daily application."

Lord Coke, who certainly could not be accused of partiality towards the Roman law, was of opinion that the division of the country into counties descended from Roman times, and that there also was to be found the origin of the English towns, cities and boroughs. He is also of opinion that the Saxon earl was the successor of the Roman consul or præfect, and the Saxon shire-reeve, or sheriff, of the Roman vice-consul.

Sir James Mackintosh says:‡ "One part of the Roman institutions had permanent consequences, of which we trace the fruits at this day. This was their care in providing for the government and privileges of towns. Thirty-three towns were established in this country with various constitutions. The choice of the decurions or senators, out of whom the magistrates were taken, was left to the inhabitants. To these magistrates belonged the care of the public worship, the municipal

* Introduction to Reeves' History, p. xlii.

† Lectures on Civilization in France, XXX.

‡ History of England, Vol. I. p. 25.

property, and the local police, together with some judicial powers. Whatever may have been some of the consequences which are attributed to the condition of these subordinate republics, it cannot be doubted that the remembrance and the remains of them contributed to the formation or preservation of their elective governments, customs which were the foundations of liberty among modern nations."

The following may be mentioned as instances of the laws in force in England at the time of the Conquest, that were long considered by English writers to be of Saxon origin, but which later researches have either proved to have been derived from Roman law, or have raised a strong presumption that such was their origin.

1. LAND LAW.—The manorial system, under which about seventy per cent. of English land was held at the date of the Conquest, has been shown by Mr. Seebohm* not to have been of Saxon origin, or to have sprung from free village communities, as generally supposed, but that it is derived in all probability from the Roman system of *coloni*. The tenure of book-land was evidently either of Roman or ecclesiastical origin, and the only examples of mortgages which we find in Saxon times are manifestly derived from the same source.

2. MUNICIPAL AND OTHER INSTITUTIONS.—To support the theory that English municipal institutions, including towns and guilds, were of Roman origin, we have the high authority of Sir James Mackintosh and Guizot, as well as Coote and Finlason. The fact that this position is contested by Bishop Stubbs and Mr. Freeman, is sufficient to lead to some hesitation in adopting it; but they may, perhaps, be said to accomplish little more than to raise doubts on account of the meagre knowledge we possess of the history of these institutions during Saxon times. The craft guilds, at least, would seem to have had their origin in the *Collegia Opificum* of the Romans.

3. WILLS AND DONATIONS.—It is now scarcely doubted that wills were introduced wholly either from Roman or Ecclesiastical law. We learn from Tacitus† that wills were unknown

* English Village Community.

† *Germania*, Ch. 20.

among the ancient Germans, and it is conceded that they were not introduced among the Saxons until after their invasion of Britain. The same may be said of donations, as well as of all charters, deeds and conveyances of land.

The constitution of the county court and the procedure, both civil and criminal, including trial by jury, have also been claimed to be of Roman descent, but the weight of evidence would seem to be against such a claim.

There is no doubt but some elements of the Roman law were introduced under Edward the Confessor, but that may be better considered in connection with the Norman than the Saxon *regime*.

THE NORMAN CONQUEST.

The effect of the Norman Conquest upon the laws of England was to introduce additional Roman elements, although under William and his immediate successors this was done chiefly in an indirect manner. He established the Curia Regis, or Aula Regis, as it was sometimes called, with its chief justiciar, next in power and authority to the king himself, as a grand central court, to supersede the Saxon county courts. In this court practised a body of men who had been trained in the Universities, and whose classical education had made them familiar with the terms and language of the civil law. He also separated the ecclesiastical courts from the civil, and thereby removed the former from the restraining influence of the common law, which under Saxon rule had largely held them in check. The compulsory use of the Norman tongue in all the courts, placed the administration of the law in the hands of a body of men who, as a rule, were not in sympathy with the distinguishing features of Saxon law. These justices were sent into the various counties where they introduced into the county courts much of the procedure which had been copied from the civil law, and which must have been a great improvement upon the rude system which had previously prevailed in these local courts.

VACARIUS.

It is to be borne in mind that the Roman occupation of Britain had ceased a few years before the promulgation of the laws of Rome, which were compiled under the auspices of Justinian. Indeed these laws were comparatively unknown in the Western Empire until their revival in the twelfth century, chiefly by the teaching of the new law school at Bologna, which attained the highest reputation. Theobald, Archbishop of Canterbury, about 1144, brought from Bologna Vacarius, one of the professors in the university there, and appointed him professor of the civil law at Oxford. While at Oxford, he published in nine books his comments upon the compilations of Justinian, for the use of the students. He treated especially of those portions of the Roman law which were in harmony with the laws of England. Its study became so popular that it provoked great jealousy on the part of the Crown, and Stephen decided to put a stop to it. John of Salisbury, who wrote about 1180, says :* "In King Stephen's time the Roman laws, which the household of the reverend father Theobald had brought into Britain, were expelled the kingdom. An edict of the King forbade any one to retain the books, and silence was imposed on our Vacarius; but by the favor of God so much the more the law grew in strength as impiety strove to weaken it." John of Salisbury, in his work called *Policraticus*, gives copious extracts from the civil law, and refers to it as being quoted in the English courts.

GLANVILLE, BRACTON, FLETA, BRITTON.

These four names, which cover a period of about one hundred years, may be mentioned both as affording strong evidence of the extent to which the Roman law had been incorporated with, or absorbed in, that of England, and as having given a very powerful impetus to such assimilation.

Glanville, who was Chief Justiciar under Henry II., wrote, shortly before 1190, the first known regular treatise on the

* Selden ad Fletam, Ch. VII., § 3.

laws of England, called *Tractatus de Legibus et Consuetudinibus Regni Angliæ*. His work professes to give only the procedure in the *Curia Regis* in which he presided, and the points of law that most frequently arose in that court. He was evidently skilled in both the civil and canon law, and made use of both of them, especially of the former, in the preparation of his work. He frequently calls attention to points of similarity in the Roman and English laws, and also to points of difference. The tenth book of his work which treats of contracts, is so largely Roman both in form and substance, that he has been accused of "aping the Roman Code."

From the time of Glanville the civil law continued to be assiduously studied under the auspices of the Oxford Law School founded by Archbishop Theobald. The central courts had to a still greater extent superseded the local Saxon courts, and had introduced a more uniform system of jurisprudence, into which Roman elements more largely entered. Glanville's work professed to give only a portion of the law. The necessity for some more complete exposition of it must have been generally felt. Accordingly, some seventy years later, about the year 1259, appeared the great work of Henricus de Bracton, an ecclesiastic and justiciar, under the same title, *De Legibus et Consuetudinibus Angliæ*. His work, like Glanville's, was written in Latin, but, unlike that of Glanville, it covered the whole field of English law at the time it was written. It is impossible to over-estimate the importance of this work or the influence which it has exerted as the chief authority upon the common law of England. Mr. Reeves says of him* "In after times he continued the great treasure of our ancient jurisprudence, where the rudiments of the law were to be traced in their first formation, where were to be seen the origin and sense of certain notions and principles, the reason of many rules of property and of practice, which had become obscure by the change of times, with the causes that led to the framing of many ancient statutes, which would be unintelligible without the help of this author. Thus was Bracton deservedly looked up to as the

* History of English Law, Ch. VIII., p. 532.

first source of legal knowledge, even so low down as the days of Lord Coke, who seems to have made this author his guide in all his inquiries into the foundation of our law." It is interesting to observe that some of the leading English legal authorities who are most prejudiced against the civil law, are among the greatest admirers of Bracton and his work, as one of the highest authorities on the common law, apparently unaware of the fact of how largely he had borrowed from Roman sources. Sir Henry Maine, while assailing Bracton as a plagiarist, and comparing his work to the Forged Decretals, is forced to acknowledge the extent to which the Roman law entered into the composition of his great work. He says,* "That an English writer of the time of Henry III. should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form, and a third of the contents, were directly borrowed from the *Corpus Juris*, and that he should have ventured on this experiment in a country where the systematic study was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence; but still it is something to lessen our surprise, when we comprehend the state of opinion at the period, as to the obligatory force of written texts apart from all consideration of the source whence they were derived."

The Roman law in Bracton was taken partly from original sources, but chiefly from the *Summa* of the Digest, Code and Institutes, compiled by Azo, the renowned Glosator, a professor in the University of Bologna, who died about 1230. Professor Güterbock, in his work on Bracton,† says that the Institutes are only once referred to by him, while he has found twelve express quotations from the Digest and ten from the Code. He goes on to say, "Much greater, however, is the number of passages of the Roman law, which are incorporated into the text itself, and into the tissue of the author's commentary, without any statement of their source. These include not only particular *leges*, but also whole connected fragments of the *Corpus Juris*, repro-

* Ancient Law, p. 82.

† Translation by Coxe, p. 50.

duced in an order but slightly modified." As to his borrowing from the *Summa* of Azo, he says,* "Throughout nearly the whole of Bracton's book we can distinctly trace the scientific influence of Azo's views and doctrines, especially in the definitions and divisions of legal notions and conceptions, which are generally clothed in Azo's words. Bracton has, however, gone still farther in availing himself of Azo's assistance, farther indeed than is consistent with our present notions of an author's dignity. Particularly when Bracton follows the course of the Institutes, that is to say, in his exposition of the law of persons, of the division and modes of acquiring things, and of the law of actions, he generally does not lay down the text of the original authority as a foundation, but gives, unaltered, Azo's corresponding commentary in his *Summa* of the Institutes, merely omitting his citations, and making necessary abbreviations and changes; or, to speak more precisely, he transcribes whole pages literally."

The work of Bracton has recently been translated by Sir Travers Twiss, and published in five large volumes, the Latin text and English translation being printed on opposite pages. The learned editor takes the view that the Roman law found in Bracton had in reality become a component part of the English law. He says,† "In many places he discusses Roman elements of law as integral parts of the laws and customs of England; he cites Roman authorities in some instances in the same familiar manner as English judgments; and in a few particular cases, after stating English judicial precedents, he illustrates them by direct quotations from the Digests of Justinian. The discrimination with which Bracton in some cases makes use of Roman principles, not importing into the subject the whole Roman law, but only portions of it, cannot well be attributed to accident; but may be reasonably accounted for by his desire to reproduce only such portions of the Roman law as had become part of the consuetudinary law of England; and the same explanation holds good where, in certain passages, apparently borrowed from the Roman law, we find slight varia-

* P. 52.

† Introduction, p. xxxvi.

tions of the text. To treat these variations as instances of misquotation would probably be an injustice to Bracton ; they are rather to be regarded as evidence that a principle of the Roman law had undergone some modification in practice to adapt it to the peculiar circumstances of the realm of England."

In the frame or outline of his work, as has been stated, he follows closely the plan of Justinian. The first part devoted to the substantive law, is subdivided into *jus ad personas*, *jus ad res*, and *jus ad actiones*, and occupies the whole of the first and second, and part of the third, of the five books into which the work as printed is divided. The second part, devoted to legal procedure, occupies the remainder of the third book and the whole of the fourth and fifth.

The limits of the present paper will not permit any detailed examination of the subjects or points of Roman law which are to be found in Bracton. A few of them will be mentioned or briefly referred to, in order that the effect of the very general adoption by later writers, and by the courts, of the law as laid down by him may be more fully appreciated.

In the early part of the first book we find that he has given the definitions of Justinian or of Azo to such terms as *justitia*, *jus*, *jurisprudentia*, and *aequitas* ; that he follows them in the *tria praecepta juris*, and by dividing law into *jus publicum* and *jus privatum* ; also by subdividing the latter into *jus naturale*, *jus gentium* and *jus civile*. For *lex* he copies the definition of the Digest, and *consuetudo* he explains by a quotation from the Code.

As to *persons*, he follows the Institutes of Justinian in dividing them into *liberi* and *servi*, identifying the English *villani* with the Roman *servi*. The Roman rule, "*partus sequitur ventrem*," he modifies, to make it express correctly the English law, to "*sequitur conditionem matris quasi vulgo conceptus*." He also follows the Roman rule as to the freedom of a slave when a lord has neglected to enforce his rights, and as to the acquisitions of a *servus communis*. He copies Azo in defining *ingenui*, *libertini*, and *hermaphroditi*, and in adding "*aut dubii*," to the division of men in the Institutes into

"*homines sui aut alieni juris*," and also in his distinctions between *furiosi*, *non compotes mentis*, and *furui*, *stulti* and *ideotae*. But it is in that part of Bracton devoted to the law of things that his use of the Roman law and the influence of his work on the common law of England are so conspicuous. He follows the Institutes and Azo in regard to the divisions of *Res*, as: *in patrimonio nostro et extra*; *corporales et incorporales*; *mobiles et immobiles*; *communes, publicae, universitatis et nullius*.

To the doctrine of possession with regard to the acquisition of property he has devoted a large space, and it is taken from Azo almost bodily, with minor changes to adapt it to the English law. As to the modes of acquiring property by the *jus gentium*, viz., *occupatio*, *alluvio*, *accessio*, *specificatio* and *confusio*, he follows the Roman law very closely; and in *accessio*, acknowledges its source by adding, "*ut in Institutis plenius inveniri potest et in summa Azonis*."

As to the modes of acquiring property under the *jus civile*, a leading place is given to *donatio*, which is used in a much wider sense than the modern word, donation, and which he speaks of as, "*magna celebris et famosa causa acquisitionis*." The Roman law divisions into *donatio inter vivos*, *mortis causa*, *simplex*, *conditionalis*, etc., are followed, and the same conditions required, viz., *mutuus consensus et voluntas*, and they are vitiated by *error*, *metus* and *vis*, as in the Roman law. *Traditio* was necessary to the validity of the *donatio*. The prohibition of donations from husband to wife, or from wife to husband, which long remained the law of England, had been only lately introduced, and was evidently borrowed from the Roman law in the interest of the feudal heir.

Usucaption, and prescription, which he gives as means of acquisition of property, were copied from the Roman law after the time of Glanville, and did not take permanent root in England, except as to real property.

The rural servitudes of *jus eundi*, *aquae ducendi*, *pascendi*, etc., are also derived from the Institutes and Azo, the latter being, however, considerably extended by Bracton.

The law of inheritance is almost entirely English; but through the influence of the Church some Roman elements were introduced as to legitimacy and bastardy, as affecting the capacity to inherit. The rights accorded to a party in good faith entering into an invalid marriage come from the same source. This subject has a special interest, from the spirited manner in which the barons at the Parliament of Merton, in 1236, resisted the demand of the Church to legitimize offspring by the subsequent marriage of their parents, when with one voice they answered: "*Nolumus leges Angliæ mutare, quæ usque ad illud tempus usitatae fuerunt et approbatæ.*" The action of partition was undoubtedly of Roman origin. Bracton says little about wills, as they were within the jurisdiction of the ecclesiastical courts. The rules prevailing were those of the civil law modified in some respects by the canon law. As to *donationes mortis causâ*, Bracton closely follows the divisions of Ulpian in the Digest.

His treatise on Actions in his third book includes the law of obligations. These occupy a comparatively small space, and he follows Azo in his definition, and the Institutes as to the sources of obligations, viz., contract, quasi-contract, delict and quasi-delict. The extinction of obligations by *solutio*, *novatio* and *confusio* has the same origin, as also his division of actions into personal, real and mixed, and the definitions of each of these.

In criminal law the definitions of treason, homicide and murder, robbery and arson, are taken from the Roman law, with little change. As to theft, he omits two points from the definition of Paulus, which is given in the Digest and Institutes, and makes two additions to make it harmonize with the English law.

The remainder of Bracton is taken up chiefly with treatises on the different kinds of real actions, called assizes, from the assize or parliament at which they were enacted. Most of these bear unmistakable evidence of a Roman origin. The only one to which special reference need be made is the assize of novel disseisin, adopted at the Assize of Northampton in 1176, in

order to protect possession against disseisin. It is borrowed in its main features from the interdicts *unde vi* and *uti possidetis*.

Such is an imperfect summary of those portions of Bracton's work, which bear the clearest indications of being derived from the Roman law. The demand for the work was great, but, being so voluminous and expensive, this demand was in part supplied by abridgments or abstracts more or less faithful and complete. The best known of these are *Fleta* and *Britton*. The former is in Latin, and derives its name, not from that of the author, but because it was composed in the Fleet prison about 1292, as is supposed, by one of the judges imprisoned there by Edward I. It is about half the size of Bracton's great work, and is considered a fair epitome of it. It is known chiefly by the edition published by Selden about 1647. The extracts from the Roman law in Bracton are largely embodied in *Fleta*, and Professor Güterbock* has pointed out that in the chapter *de dotis constitutione* there are additions of Roman law matter not found in the original.

Another treatise based upon Bracton is that called *Britton*. It is in Norman French, and was written about 1297. The name is believed to be a mere variation of Bracton. Mr. Nicholls, who has edited the work, is of opinion that the author was familiar with both Bracton and *Fleta*, but made much more use of the latter than the former in his work, which, from some expressions, is thought to have been undertaken at the instance of the king.

Later writers of the highest authority on English law, and even those who are strongly prejudiced against the Roman law, as well as the courts themselves, have quoted with approval copious extracts from Bracton and these compilations, including a large portion of the civil law embodied in them.

Sir Edward Coke, who thought the Roman law only increased doubts and uncertainties instead of resolving them, and whose knowledge of that law was very limited, constantly quotes from Bracton with approval, and adopts many extracts which are taken directly from the Roman law. He refers only once

* Bracton, p. 70.

to the Digest of Justinian and once to the Institutes, and in both instances his quotations are incorrect. Lord Hale, in his *History of the Common Law*,* in speaking of Bracton's work, says: "The greater part of its substance is either of the course of proceedings in the law known to the author, or of resolutions and decisions in the English Courts." Blackstone says:† "There are also other authors to whom great veneration and respect is paid by the students of the common law. 'Such are Glanvil and Bracton, Britton and Fleta, . . . with some others of ancient date, whose treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles." In speaking of the Roman doctrine of property arising from accession, he says:‡ "And these doctrines are implicitly copied and adopted by our Bracton, and have since then been confirmed by many resolutions of the Courts."

Nor are the utterances of judges, as found in the reports, less emphatic. In the celebrated judgment of Lord Holt in the leading case on bailments, *Coggs v. Bernard*,§ Bracton is quoted or referred to approvingly no less than seven times. In support of the proposition that a man who receives goods to be kept gratis is not answerable, except in case of gross neglect, he cites from Bracton,|| and remarks: "This Bracton I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so." He also quotes from him in support of the doctrine of the liability of the borrower, if he use the goods in a manner not warranted by the terms of the loan. In the case of lending for hire, in laying down the rule that the bailee is bound to take the utmost care and return the goods, he says:¶ "And here again I must recur to my old author." He further refers to him in support of the liability of a person who negligently executes a gratis commission, and after quoting from Justinian and Bracton as to *mandate*, he adds:** "I don't find

* P. 189.

† Comm., I., p. 72.

‡ Comm., II., p. 404.

§ 2 Lord Raymond's Rep., p. 909.

|| Br. Lib. 3, Ch. 2, 99b.

¶ P. 916.

** P. 919.

this word in any other author of our law, besides in this place of Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority."

In the Grand Opinion* for the Prerogative concerning the marriage and education of the king's grandchildren in 1717, where the counsel for the Prince of Wales claimed that Bracton, who was opposed to his pretension, ought not to be regarded, because he deviates from the common law, and is nothing but civil law: ten of the twelve judges adopted the law as laid down in Bracton. Most of them do not refer specially to this part of the argument, but Chief Justice Parker said:† "As to the authority of Bracton, to be sure, many things are now altered, but there is no color to say it was not law at that time, for there are many things that have never been altered and are law now." Baron Fortescue, who gave the leading opinion for the majority of the judges, said:‡ "The law books of Bracton and Fleta, which have been quoted, are the ancient law of the land, extending to all cases; but this law being altered only in private cases, by usage and statute, it remains law to this day as to the royal family, because as to them this law has had no alteration by any law or statute whatever, and the usage has gone accordingly. These law books are so strong that there has been no way thought of to evade them, but by denying the authority of them, and calling it civil law. But I own I am not a little surprised that these books should be denied for law, when in my little experience I have known them quoted almost in every argument where pains have been taken if anything could be found in those books to the question in hand, and I have never known them denied for law but when some statute or usage time out of mind has altered them." Baron Montague said:§ "I insist on Bracton and Fleta being good authorities. It is objected, indeed, this is civil law; that may be, and yet it may be and is the law of the land also, and these books take notice of several things that are law now, besides this case; these books are often quoted by the greatest judges and lawyers heretofore in England, and allowed as law."

* Fortescue's Reports, p. 401.

† Fortescue, p. 408.

‡ Fortescue, p. 419.

§ Fortescue, p. 424.

In the case of *Blundell v. Cutterall*,* where the right of the public to the use of the sea-shore was in question, Best, J., after quoting from Bracton† at some length, says: "Bracton has not stated this as civil law, he has made it part of his book, *De Legibus et Consuetudinibus Angliæ*. He was Chief Justice of England in the reign of Henry III.; and Lord Hale says that, in his time, the common law was much improved and the pleadings were more perfect and orderly than in any preceding period of our history. Surely such a man is no mean authority for what the common law was at the time he wrote. . . . I do not say that the whole of the passage in Bracton is now good law; it was all good law at the time he wrote, and all of it that is adapted to the present state of things is good law now."

In the later case of *Gifford v. Lord Yarborough*,‡ Best, then Chief Justice, in giving the opinions of the judges as to land formed by alluvion, quotes a passage from Bracton§ in favor of the proposition that it belongs to the owner of the adjoining land and not to the Crown, and adds: "It is true Bracton follows the civil law, for the passage above quoted is to be found in the same words in the Institutes. But Bracton, by inserting this passage in his book on the laws and customs of England, presents it to us as part of those laws and customs. . . . Bracton wrote on the law of England, and the situation which he filled, namely, that of Chief Justice in the reign of Henry III., gives great authority to his writings. Lord Hale, in his history of the Common Law, says that it was much improved in the time of Bracton. This improvement was made by incorporating much of the civil law with the common law. We know that many of the maxims of the common law are borrowed from the civil law, and are still quoted in the language of the civil law. Notwithstanding the clamor raised by our ancestors for the restoration of the laws of Edward the Confessor, I believe that these and all the Norman customs which followed would not have been sufficient to form a system of

* 5 Barnewall and Alderson, p. 268.

‡ 5 Bingham, p. 163.

† Lib. 1, Ch. 12, s. 6.

§ Book II., Ch. II.

law sufficient for the state of society in the times of Henry III. Both courts of justice and law writers were obliged to adopt such of the rules of the digest as were not inconsistent with our principles of jurisprudence." He then goes on to quote with approval the remarks of Chief Justice Fortescue given above.*

In the case of *Nugent v. Smith*,† Brett, J., in discussing the liability of a ship-owner as a common carrier, says: "No one who has read the treatise of Mr. Justice Story on Bailments, the essay of Sir William Jones, and the judgment of Lord Holt in *Coggs v. Bernard*, can doubt that the common law as to bailments is founded upon, though it has not exactly adopted, the Roman law. It is true that Lord Holt rests as for authority solely on Bracton; but the treatise of Bracton adopts all the divisions of the Roman law in the very words of the Roman text, and further adopts the exception of the Roman law and the Roman reasons for it. The divisions may be the logical divisions of the subject, and so be naturally adopted by all in every country who treat the subject logically; but the exception, both in the Roman Empire and in England, was no natural exception, but one depending entirely on public policy, arising from the manner in which some particular kinds of business were carried on in both places. It is obvious, therefore, that Bracton, or English judges before him, adopted into the English the Roman law." This conclusion seems to be well founded, although Chief Justice Cockburn strongly dissented from it in the Court of Appeal‡ in reversing the judgment of Mr. Justice Brett. In the recent case of *Foster v. Wright*§ (1878), Justice Lindley recognized the authority of Bracton regarding alluvion and its Roman origin. He says: "Gradual accretions of land from water belong to the owner of the land gradually added to; and conversely, land gradually encroached upon by water ceases to belong to the former owner. The law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the

* Ante p. 22.

‡ Law Reports, 1 C.P.D., p. 428.

† Law Reports, 1 C.P.D., p. 28.

§ Law Reports, 4 C.P.D., p. 446.

constant action of running water. The history of the law shows this to be the case. Our own law may be traced back through Blackstone, Hale, Britton, Fleta and Bracton to the Institutes of Justinian, from which Bracton evidently took his exposition of the subject."

THE CIVIL AND COMMON LAW.

It would be interesting to trace the varying fortunes of the civil law in England, subsequent to Vacarius, apart from those portions of it embodied in Bracton and other acknowledged authorities on the common law referred to in the foregoing pages, but the merest glance must suffice. Stephen's ordinance against its study, already referred to, seems to have had but little effect. In the reign of his successor, Henry II., we are informed by Peter, chancellor to Theobald, Archbishop of Canterbury, that in the Archbishop's house, after prayer and breakfast, the most learned men in the kingdom took part in discussing knotty points of law. Giraldus, of Oxford, quotes from Justinian's Institutes as recognized authorities in the reigns of Richard I. and John, and tells us that a clerk, Martinus, blamed the Oxford professors "because the imperial laws suffocated all other sciences." Roger Bacon, in the following reign, accused the bishops of neglecting the study of theology for "the quibbles of law that fouled philosophy." There is no doubt that a strong prejudice was created against the public law of Rome, on account of the principles of absolutism which it contained. Such maxims as "*quod principi placuit legis habet vigorem*," made it specially obnoxious to those who wished to restrict the power of the king. The provision of the Magna Charta, that trials were to take place "*per parium judicium vel per legem terrae*," was no doubt intended to substitute the rules of procedure of the common law for those of the civil or canon law. In the reign of Henry III. every judge took an oath to decide all cases "*secundum legem et consuetudinem regni*," this being the expression used at that time when the law of England was contrasted with that of Rome.

In the same reign (1235), the bishops desired to have the

rule of the civil and canon law as to the legitimation of natural children by subsequent marriage adopted in the statute of Merton, but the barons with one voice declared "*quod nolunt leges Angliæ mutare.*" No doubt a great deal of the hostility manifested to the Roman law at this time, and in later periods of English history, was owing to the difficulties between the English people and the Pope, and the fact that the civil and the canon law were very much alike, and were intimately associated in the popular mind.

Notwithstanding this hostility, the civil law retained its hold at least until the reign of Edward II., when the Chief Justice declared from the bench that the law of England was based upon the civil law by asking of counsel, "*Que repondez vous a la ley empiel, sur quel ley de terre est fondue?*"

During the reigns of Edward I. and Edward II. we find that the Roman law was habitually cited in the common law courts, from the compilations of Justinian, as absolutely conclusive authority.

Under Edward III., the influence of the civil law, at least so far as it was not embodied in Glanville and Bracton, began to wane. In 1347, an eminent sergeant, Skipworth, in defending a case *contra inhibitionem novi operis*, argued that these Latin words had no meaning,* showing his ignorance both of the civil and the canon law. In the same reign (1362), a statute was passed authorizing the use of English† in the pleadings in the courts, a measure which tended to depreciate the civil law. In the succeeding reign (Richard II.), we find the barons again protesting that they would never suffer the kingdom to be governed by the Roman law, and the common law judges prohibited its being cited in their tribunals. By the middle of the fifteenth century, the common law seems to have obtained a complete ascendancy in these courts, and Chief Justice Fortescue in his work, "*De Laudibus Legum Angliæ*," published in the reign of Henry VI., is never tired, in his lectures to the heir-apparent, of disparaging and even misrepresenting the civil law, and unduly extolling the superiority of the common

* Year Book, Edw. III., p. 37.

† 36 Edw. III., St. I., Ch. 15.

law. The highest authorities on English law during the next three hundred years, although more moderate than Fortescue, held the civil law in light esteem, and of no binding authority. Coke says that "The laws of England are not derived from any foreign law, either canon or civil or other, but are a special law appropriated to this kingdom."* Hale says, in his *History of the Common Law*:† "It is most plain, that neither the canon law, nor the civil law, have any obligation as laws within the kingdom, for no laws of the Pope and Emperor, as they are such, bind here. For we are not bound by their decrees, further or otherwise than as the kingdom here has, as it were, transposed the same into the common or municipal law of this realm, either by admission of, or enacting the same, which is that alone which can make them of any force in England."

Blackstone takes substantially the same position as Coke and Hale. He says:‡ "For the civil and canon laws, considered in respect to any intrinsic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But as far as these foreign laws, on account of some peculiar propriety, have, in some particular cases and in some particular courts, been introduced and allowed by our laws, so far they oblige, and no further, their authority being wholly founded on that permission and adoption." These writers, as we have seen, acknowledge the authority of Bracton and the other writers of the 13th century, so that the foregoing remarks apply only to those portions of the Roman law that have not been embodied in these early authors. Blackstone especially acknowledges the authority of the Roman law found in Bracton, and cites approvingly other portions of the civil law which agreed with the law of England.

In the celebrated case of *Lane v. Cotton*,§ as to the liability of the Postmaster-General for a letter lost by the negligence of a clerk, Lord Holt acknowledges a greater indebtedness on the part of the common law. He says: "And this is the rea-

* Coke III., 153.

† P. 22.

‡ Comm. I., p. 14.

§ 12 Modern Reports, p. 482.

son of the civil law in this case, which though I am loth to quote, yet inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law, as all governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed from the civil law." Probably one of the most authoritative and concise statements as to the position of the civil law in those courts of England, where the common law alone is recognized, is that of Chief Justice Tindal, in the case of *Acton v. Blundell*,* where the Institutes, Digest and Code of Justinian had been freely quoted and discussed. He says: "The Roman law forms no rule binding in itself upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived if it proves to be supported by that law—the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe. The authority of one at least of the learned Roman lawyers appears decisive upon the point in favor of the defendants;" and he proceeds to quote the opinion of Marcellus as given in the Digest.

What has been said thus far relates to the civil law as it has found its way into the common law, either directly or through the English writers referred to.

A brief reference will now be made to some of the English courts, in which the civil law enjoyed a place and authority denied it in the common law courts. By far the most important of these was

THE COURT OF CHANCERY,

"Roman to the backbone," as has been said. The office of Chancellor in England has been traced back to the time of the Saxon kings, when he was the chaplain and confessor of the king, and "keeper of the king's conscience." Under them and the early Norman kings, he was the secretary who took charge

* 12 Meeson & Welsby, p. 353.

of the applications made to the king as the fountain of justice, and directed them to the proper quarter for redress. His rank was below that of a bishop, and it was only through the extraordinary ability and ambition of such chancellors as Becket and Longchamp, that the office rose into the importance which it has since enjoyed. Among his duties were the affixing of the great seal to charters and other documents, and supplying writs to suitors who wished to litigate in the courts. According to the best authority, the Chancery first became a court under Henry II., at the same time as the King's Bench, Common Pleas, and Exchequer, when the old *Aula Regis* or *Curia Regis* was divided. At least, its common law jurisdiction dates from that period, and Lord Campbell* is of opinion that its extraordinary or "equitable jurisdiction," which afterwards became its most important function, and served a useful purpose in tempering the rigor of the common law, is quite as ancient. "Its jurisdiction is in reality the residuum of that of the *Commune Concilium* or *Aula Regis*, not conferred on the other courts, and necessarily exercisable by the Crown as a part of its duty and prerogative to administer justice and equity."†

It is not difficult to understand why the civil law should be supreme in this court. Down to the time of Wolsey, no less than 160 ecclesiastics had filled the office of Chancellor, while the only laymen we have any record of are Sir Robert Bouchier, and a few others, for a short period in the reign of Edward III. The chancellor was moreover assisted in his duties by twelve clerical masters of the civil law, who sometimes sat upon the bench with him, to advise him. The hostility of the common law judges to the civil law also tended to bring about the same result. "The effect of the exclusion of the Roman law from the common law tribunals, was that a distinct code of laws was formed and administered in the Court of Chancery, by which the enjoyment and alienation of property were regulated on principles varying in many essential particulars from the system which those who originated and carried into effect

* *Lives of the Lord Chancellors*, Vol. I., p. 7.

† *Story's Equity Jurisprudence*, § 49.

the exclusion of the Roman law were so anxious to preserve.”* The equitable jurisdiction of the court therefore grew up very much in the same manner and under the same circumstances as the equitable jurisdiction of the praetor at Rome.† “The principles on which the decisions of the chancellor in the exercise of his extraordinary jurisdiction were founded, were those of honesty, equity, and conscience.”‡ Recourse was, therefore, naturally had to those large principles of universal justice taught by the imperial law, and which were so admirably “adapted to any set of people and any state of things,” with which the clerical chancellors and their assistants were so well acquainted.

When, after the Reformation, lay chancellors were appointed, they found a symmetrical system fully established, and they naturally followed the precedents set by their learned predecessors. In the eighteenth century we find that they freely availed themselves of the works of the civilian writers of the continent, such as Grotius, Puffendorf, and Vinnius, in the extension of that system of equity inseparably connected with the court, and whose flexibility and adaptability to changing circumstances and advancing civilization form one of its chief claims to favorable recognition.

Lord Campbell has told us of the preparation for his work of Lord Hardwicke, one of the chancellors of this period, who accomplished much in maintaining and extending the prestige and the influence of this court, and who perfected English equity into a symmetrical science. He describes him as “the man universally and deservedly considered the most consummate judge who ever sat in the Court of Chancery.”§ As to his preparation for filling the high office, he says:|| “But that to which I mainly ascribe the brilliancy of the career on which he was entering was the familiar knowledge he acquired of the Roman civil law. Like most English lawyers, in preparing for the bar, he had hardly paid the slightest attention to it. Now

* Spence, *Equitable Jurisdiction of the Court of Chancery*, Vol. I., p. 346.

† Story's *Equity Jurisprudence*, § 50.

‡ Spence, p. 339.

§ *Lives of the Lord Chancellors*, Vol. VI., p. 72.

|| *Lives of the Lord Chancellors*, Vol. VI., p. 111.

that he was to sit in the House of Lords, as sole judge to decide all appeals from Scotland, he saw the necessity of making himself a profound Scotch lawyer, and he found that this was impossible without being a good civilian. Therefore, having gone through Mackenzie, Bankton and Stair, he regularly proceeded to the *Corpus Juris Civilis*, with Vinnius, Voet, and other commentators, and his mind was thoroughly imbued with the truly equitable maxims of this noble jurisprudence. I delight in recording how his unrivalled eminence as an equity judge was achieved, lest the aspiring but careless student should think it could be reached by natural genius and occasional exertion."

The following are some of the branches of English law in which the Court of Chancery has exercised the greatest influence in introducing the principles of the Roman law:—The rules relating to executors, the construction of wills and documents generally; uses and trusts, corresponding to a large extent with *fideicommissa*; the rules regarding the equity of redemption in the law of mortgages; the guardianship of infants and lunatics; the setting aside of contracts for fraud or mistake; the law of set-off; and the equitable assignment of choses in action and the like. In procedure its injunctions were probably copied from the prohibitory interdicts of the praetor;* its process for discovery from the *actio ed exhibendum*, or the old *actio interrogatoria*, and the procedure for the examination of witnesses *de bene esse* from the Roman rules on the same subject.† The provisions of the English Judicature Act of 1873,‡ and of the Ontario Judicature Act, 1881,§ that the High Court of Justice and the Court of Appeal thereby constituted should, in certain important respects named, follow the old rules of the Court of Chancery, and, in England, also those of the Court of Admiralty, and that generally when there was any variance between the rules of equity and those of common law, the former should prevail, wrought in the law of these countries a radical change by the general sweeping introduction of equitable principles. Changes in a like direction, if

* Inst. Lib. IV., Tit. XV., 1. ‡ 36 and 37 Vict., Ch. 66, secs. 24 and 25.

† Dig. Lib. IX., Tit. II., 40. § 44 Vict., Ch. 5, secs. 16 and 17.

more gradual, have been going on in other British colonies and in the United States, so that, with even greater propriety than did Lord Campbell in 1849, one might now speak of "that vast juridical system called equity, which, not only in this country and in our colonies, but over the whole extent of the United States, regulates property and personal rights more than the ancient common law."*

COURTS ECCLESIASTICAL, MILITARY AND MARITIME.

These courts are described and their jurisdiction and procedure discussed by Blackstone in the fifth chapter of the third book of his Commentaries. The civil law, both as to principles and procedure, entered into them much more generally than into the courts of common law and even of equity. The Court of Chivalry, which was a military court, or court of honor, was in high repute in the days of pure chivalry, and had "cognizance of contracts and other matters touching deeds of arms and war, as well out of the realm as within it." Sir Matthew Hale informs us that "its later business was to adjust the rights of armorial ensigns, bearings, crests, supporters, pensions, and also rights of place and precedence." It was never formally abolished, but most of its functions were by various statutes assigned to other courts. Coke informs us that it proceeded according to the civil law. The former jurisdiction of the courts ecclesiastical and maritime are now merged in the Probate, Divorce, and Admiralty Division of the High Court of Justice.

The ecclesiastical courts were separated from the civil by William I. For a time they had exclusive jurisdiction over the persons of ecclesiastics, but subsequently only over tithes and other church questions, and matrimonial, testamentary, and abintestate matters. The proceedings in these courts were regulated according to the practice of the civil and canon laws, or rather to a mixture of both. "The establishment of the civil process in all the ecclesiastical courts," says Blackstone,† "was indeed a masterpiece of papal discernment, as it made a coalition impracticable between them and the national tribunals.

* Lives of the Lord Chancellors, Vol. VI., p. 110. † Comm., Vol. III., p. 99.

without manifest inconvenience and hazard." They have preserved more faithfully than any other court the procedure and traditions of imperial Rome, and this, no doubt, in a great measure because the judges were formerly ecclesiastics, and when lay judges were first appointed a well-defined system, founded on the civil and canon law, had been firmly established.

The Court of Admiralty, which had jurisdiction over matters arising wholly on the high seas, out of reach of the ordinary courts of justice and of the common law, which was the law of the *land*, followed a procedure that was a close transcript of the mode of trial under the later legislation of Justinian, except in so far as it was from time to time modified by statute. It always recognized the Rhodian law as found in the Digest, and the laws of Oleron. "Its proceedings are according to the civil law," says Blackstone. This arose in part from the fact that many of the judges of the court, acting as deputies of the admiral, were ecclesiastics. The fact of the civil law being followed in both the Admiralty and Ecclesiastical Courts led to their somewhat curious union under the presidency of the same judge and in the same chambers.

The civil law was also followed in the courts of the Universities of Oxford and Cambridge. By the charters and statutes governing them they were at liberty to proceed according to the practice of the laws, statutes, privileges, liberties, and customs of the universities, or the laws of the land, or the civil law, at their discretion. As might have been expected from such bodies, they chose the latter, so that the civil law became in them as binding an authority as in the ecclesiastical courts.

Another means by which some of the principles of the Roman law have been introduced into England has been by the very common use of

LATIN MAXIMS

by the judges, whose classical training has led them, often insensibly, to this practice. Some of these have been taken directly from the *Corpus Juris*; more frequently they are from other Latin authors, who have faithfully reproduced the thoughts, though not the exact words of the civil law. A

reference to Broom's or Wharton's Legal Maxims, and to the 211 maxims of the Roman law, found in Lib. L., Tit. XVII., of the Digest, will give an idea of the extent and influence of this source of the law, to which, as a rule, little attention is paid. As to their authority and origin, Broom says:* "The judges allow themselves to be governed by the admitted maxims of the law. In conformity with our most approved commentators I have mentioned maxims, as an important element of our common law. Of these maxims which embody principles of much value when their application is rightly understood, many have been derived from the civil law." The remarks of Chief Justice Best, in the case of *Gifford v. Lord Yarborough*,† regarding maxims, are also to the same effect.

LEGISLATION.

This important method of the introduction of Roman law must not be wholly overlooked. A very few examples must suffice. The Assize of Novel Disseisin, which in large part adopted the interdicts *Unde vi* and *Uti possidetis*, has already been referred to. The Statute of Distribution of intestate estates‡ is taken largely from the 118th and 127th Novels of Justinian. The Bankruptcy Acts, among other civil law remedies and provisions, have given the trustee the right to take the *Actio Pauliana*, to set aside acts done in fraud of creditors; while the various Married Women's Property Acts have been tending to assimilate the English and the Roman law. The Judicature Act has introduced many Roman elements from the Court of Chancery and the Admiralty, and among other changes has made the law of set-off almost equivalent to the *compensatio* of the civil law; while it has also in England introduced the equitable assignment of choses in action—a provision previously enacted in Ontario by the Mercantile Law Amendment Act of 1872.

In even a cursory review, like the present, of this important subject, there should be some allusion to certain branches of the law which have adopted to a greater or less extent princi-

* Broom's Common Law, p. 22.

† Ante, p. 23.

‡ 22 Car. II., Ch. 10.

ples of the Roman law, sometimes by methods not yet specially mentioned.

Both public and private international law are based almost wholly upon the civil law. On this point, Maine says: * "It is surprising how large a part of the system (of international law) is made up of pure Roman law. Whenever there is a doctrine of the *jurisconsults* affirmed by them to be in harmony with the *jus gentium*, the publicists have found a reason for borrowing it, however plainly it may bear the marks of a distinctively Roman origin." Private international law may be said to have been almost unknown in the English courts until the time of Lord Hardwicke and Lord Mansfield. The fact that its foundations were laid both in the chancery and in the common law by these distinguished judges, both of them skilled in the Roman law and both admirers of its excellences, largely accounts for its favorable reception and subsequent extension.

The mercantile law of England may be traced very largely to the same source. Lord Mansfield, who has been aptly called the father of modern mercantile law, "was versed not only in the law and history of his own country, but in those celebrated writings which constitute the noblest monuments of ancient greatness."† He found the commercial law of England in a state of chaos and altogether inadequate to meet the requirements of a commercial people. By means of the verdicts of special juries as to what was the usage of merchants and the *lex mercatoria*, he framed a system in harmony with the principles of the civil law. For this he was bitterly attacked by Junius, who wrote: "In contempt or ignorance of the common law of England, you have made it your study to introduce into the court where you preside measures of jurisprudence unknown to Englishmen. The Roman Code, the law of nations, and the opinions of foreign civilians are your perpetual theme; but who ever heard you mention Magna Charta or the Bill of Rights with approbation or respect?" Lord Campbell defends him and says there is not the slightest color or pretence for the charge. That he did freely introduce the civil law, which he

* Ancient Law, p. 97.

† Smith's Mercantile Law, p. 11.

greatly admired, is indisputable; that it was one of the greatest services that has been rendered to the commerce of England is equally true.

The law of general average also comes to us from the law of Rome. The rule laid down by Mr. Justice Lawrence, in the leading case of *Birkley v. Presgrave*,* in 1801, where a common law court first undertook to deal with a case of general average, and which has since been followed, was a translation of the definition of the *Ordonnance* of Louis XIV., which in turn was based upon Justinian's Digest, *De Lege Rhodia de jactu*.† It had always been recognized as a part of the law merchant. There have been a large number of cases in the English courts, from *Birkley v. Presgrave* down to *Svenden v. Wallace*,‡ decided in the House of Lords in 1885, but so closely has the Roman law been followed, that a leading text-writer on the subject has been able to say regarding the title of the Digest above referred to:§ "A perusal of this section of the Roman law will show that, with the exception of the chapter on the relation of general average to marine insurance—which latter contract was then unknown—it covers the whole ground gone over in this volume; and there is scarcely a point which has been or may be debated but this law throws more or less of light upon it. Modern civilization in this, as in many other respects, appears to have been only slowly travelling back to the point from which it was hurled down by the fall of the Roman empire."

The extension of the equitable principles of the action in *assumpsit* by Lord Mansfield, in the leading case of *Moses v. Macferlan*,|| and the cases that followed it, affords another instance of the introduction of a number of the doctrines of the Roman law into the procedure in commercial cases which has proved of immense service in developing the commercial law of the country. Passage after passage of Lord Mansfield's judgment in this case is taken directly from the Roman law, as

* 1 East's Rep., p. 220.

† Dig. Lib. XIV., Tit. II., 1.

‡ Law Rep., 10 Appeal Cases, p. 404.

§ Lowndes on General Average, App. A., p. 255.

|| 2 Burrow's Rep., p. 1,005.

is pointed out by Mr. Evans in his translation of Pothier's work on Obligations.*

The introduction of the Roman law as to Bailments by Lord Holt, in the case of *Coggs v. Bernard*,† has already been considered when reviewing the work of Bracton and its influence on English law. The claim has been strongly contested by Chief Justice Cockburn in the case of *Nugent v. Smith*.‡ He views it simply as a relaxation of the very strict rules which had prevailed in the common law courts up to that time. Judge Holmes, of Boston, in his work on the Common Law, endeavors to show that the English law in this respect "is of pure German descent," and that "in this, as in other respects, the English followed the traditions of their race."§ His theory seems, however, to be a far-fetched one, in view of the undisputed fact of the adoption of the Roman law by Bracton.

The English law of easements has also been borrowed largely from the Roman law of prædial servitudes. In some instances this obligation has been fully acknowledged. For example, the rights of riparian proprietors in a water-course or non-navigable stream in England were formally declared to be identical with the civil law by the Privy Council in the case of *Miner v. Gilmour*,|| which was an appeal from Lower Canada where the civil law was in force. Their Lordships, in laying down the law of England, do little more than translate the passages in the Digest bearing on the subject.¶

The assigned limits of the present paper have already been exceeded, and the subject cannot now be pursued further. No one can be more conscious than the writer how imperfectly the subject has been treated. Champions of the common law will, no doubt, be of opinion that he has claimed too much for the Roman law. His aim has been not to base any claims on mere identity or similarity between the two systems, but to restrict them to instances where there is either direct evidence or a strong presumption that the claim can be substantiated. His hope is that some competent writer on the origin or sources of our

* Evans' Pothier, Vol. II., p. 379.

§ Holmes on the Common Law, p. 174.

† 2 Lord Raymond's Rep., p. 909.

|| 12 Moore's Privy Council Rep., p. 156.

‡ Law Rep., 1 Com. Pleas Div., p. 430.

¶ Dig. Lib. XXXIX., Tit. II., 26.

law may take up this subject, and treat it as its importance demands. As a preliminary to this, if some student of the Roman law would do for the Digest what Mr. Williams has done for the Institutes of Justinian in his little work,* very material and valuable assistance would be given to the future historian in the prosecution of such a work.

To sum up. It is submitted that an impartial consideration of the question will lead to the conclusion that the law of England is much more largely indebted to the Roman law, and has embodied many more of its provisions than has been generally conceded by the admirers of the former, and that the following propositions are well founded :—

1. That a large portion of the English common law, generally supposed to be indigenous, is of Roman origin, having either survived from the Roman occupation, or having been subsequently introduced through the influence of the Church, or under the early Norman kings.

2. That further additions were made to these Roman law elements in consequence of the revival of the study of civil law under Vacarius and his successors, and the incorporation by Bracton into his work of a considerable part of the *Corpus Juris*, either previously embodied in the common law or inserted by him as not being inconsistent with its provisions.

3. That many of the principles of the civil law were adopted through the medium of the Court of Chancery, the ecclesiastical courts, and the Court of Admiralty, where the civil law rules were either adopted or generally recognized as authorities.

4. That even in the common law courts the extension of the law to meet the requirements of advancing civilization, and particularly the development of modern mercantile law, were largely on civil law lines, through the adoption of the *lex mercatoria*, and the favor with which eminent judges, such as Lord Holt and Lord Mansfield, regarded the Roman law.

5. That recent legislation, as, for instance, the extension of the rules of equity by the Judicature Act, has infused the equitable principles of the civil law into the law of England.

* Inst. of Justinian Illustrated by English Law.

